

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Prime Therapeutics, LLC,)
) File No. 22-mc-35
) (WMW-JFD)
Movant,)
)
vs.) St. Paul, Minnesota
) September 29, 2022
CVS Pharmacy, Inc., and CVS) 1:59 p.m.
Health Corporation,)
)
Respondents.)

BEFORE THE HONORABLE JOHN F. DOCHERTY
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

(MOTION HEARING)

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: So we're here for a hearing on the case of Prime Therapeutics v. CVS Pharmacy. File Number is 22-mc-35.

Let's get appearances beginning with counsel for the movant, Prime Therapeutics.

MS. MCCALMONT: Good afternoon, Your Honor. Would you like us to remain seated at the counsel's table or --

THE COURT: That's fine. I think, you know, one of the counsel does have some illness in their family, and so I thought that we should probably stay masked today. If you are over there by yourself and it becomes a problem understanding, I think you could take your mask off. I may do -- I may do the same. But to the extent possible, given the circumstances, and I'm grateful to counsel for bringing it to our attention, I think that we should do our most -- the most we can within the limits of understandability to keep safe today. So --

MS. MCCALMONT: Understood, Your Honor. Thank you. I just didn't want to show disrespect by not standing up.

THE COURT: No, no, no. Don't worry about that.

MS. MCCALMONT: So I am Virginia McCalmont,

1 Your Honor, of Forsgren, Fisher, McCalmont, DeMarea, and
2 Tysver on behalf of movant Prime Therapeutics.

3 THE COURT: Okay. Good afternoon.

4 And for CVS?

5 MR. GEYERMAN: Good afternoon, Your Honor. Grant
6 Geyerman from Williams & Connolly for CVS.

7 THE COURT: Good afternoon. And who's with you,
8 Mr. Geyerman, at the table? I see --

9 MR. GEYERMAN: I'll let them introduce themselves
10 if that's okay.

11 THE COURT: Yes, I jumped the gun.

12 MR. GUIANG: Good afternoon, Your Honor. Andrew
13 Guiang here from Williams & Connolly on behalf of CVS
14 Pharmacy.

15 THE COURT: Okay.

16 MR. JOHNSON: Sam Johnson with the firm Skolnick &
17 Bardwell appearing as local counsel.

18 THE COURT: Okay. Good afternoon to all of you.

19 Just to -- before we get started, going through
20 the materials here, I have a number of questions. There are
21 some things that are -- let's just say I need to get them
22 clarified. I think I know the answers to some questions.
23 But in other areas, I'm genuinely rather puzzled.

24 And so we'll -- you know, we'll begin with counsel
25 for Prime, but I'll just say that anticipate more than the

1 usual number of questions and even questions that might be
2 changing the topic that you are talking on.

3 So with that, you have the floor.

4 MS. MCCALMONT: Thank you, Your Honor. Virginia
5 McCalmont on behalf of Prime Therapeutics. I was intending
6 to address three issues briefly this afternoon, so --

7 THE COURT: Sure.

8 MS. MCCALMONT: -- first the motion to quash
9 Request 2, which is the request that relates to the response
10 to proposal documents.

11 THE COURT: Right.

12 MS. MCCALMONT: The motion to quash is the part --
13 the part of the motion that relates to cost shifting, and
14 then very briefly the motion to compel. Please do feel free
15 to interrupt with questions at any time, Your Honor.

16 THE COURT: Oh, I will, yeah.

17 MS. MCCALMONT: So beginning then with the motion
18 to quash Request 2, as I noted, that request relates to or
19 requested each response by Prime to any request for
20 proposal, or RFP as the parties call it, during a 16-year
21 period as it relates to any plaintiff in the CVS action.

22 THE COURT: Now, that was -- 16 years was the way
23 that that subpoena was originally served. But I do note in
24 the motion papers that there's been extensive negotiation
25 over this subpoena. Has that been narrowed down at all?

1 MS. MCCALMONT: There has been extensive
2 negotiation but not as to the date range.

3 THE COURT: Not as to the date range. Okay.

4 And the other question I've got with respect to
5 RFP 2 was I wanted to understand what looks like a
6 methodology that you are using as a proxy for irrelevance.
7 I'll have to confess, I spent considerable time trying to
8 understand the relationship between the 1,920 documents and
9 the 236 documents. And I think I've got it, which is that
10 your client looked for documents responsive to RFP Number 2,
11 found 1,920, thought that they were probably irrelevant to
12 this case, and to test that hypothesis, ran CVS's search
13 terms against those 1,920, and there were 236 documents that
14 hit.

15 Am I even close?

16 MS. MCCALMONT: That's exactly right, Your Honor.
17 The only slight tweak is we only ran the U & C related
18 search terms. We didn't run the entire set of search terms.
19 So just that one that was focused on U & C because we
20 thought that was the one that was most likely to generate --
21 to the extent there were relevant hits, that that would be
22 the one that would identify those within the document set.

23 THE COURT: But these were not search terms, or
24 were they, that CVS had proposed specific to RFP Number 2.
25 These were general search terms for all, I think, 16

1 components of this subpoena?

2 MS. MCCALMONT: That's correct, Your Honor.

3 THE COURT: Okay. So what does then this ratio of
4 236 to 1920 really tell us about relevance or irrelevance?
5 What are the limits of what we can take this for?

6 MS. MCCALMONT: That's a fair question,
7 Your Honor. I think from our perspective, when we have had
8 discussions with CVS's counsel, we had asked what the
9 relevance of the full Request 2 was, what exactly it was
10 related to the case -- or that made that request relevant
11 for the case. And the answer that we got was specific to
12 U & C. So what we were told is to the extent that Prime was
13 responding in its response -- or, yeah, responses to
14 proposals from plaintiffs by discussing how it approached
15 the U & C pricing methodology, what was or wasn't included,
16 that that sort of discussion is what would render those
17 materials relevant. So I do think that the use of the U & C
18 search term is a reasonable proxy for relevant materials
19 within the set, at least as far as I understand CVS
20 counsel's argument for why those materials would be relevant
21 at all.

22 THE COURT: All right. And when we talk about
23 RFPs and response -- or responses to RFPs, excuse me, are we
24 talking about a set of responses that is limited to
25 responses to the plaintiffs in this case?

1 MS. MCCALMONT: I believe that is correct,
2 Your Honor. That's certainly how the request was phrased,
3 and so I believe that is how we attempted to collect
4 documents.

5 THE COURT: And when you say "I believe," is there
6 some tentativeness to that response?

7 MS. MCCALMONT: We have not reviewed the 1,920
8 documents, so I wouldn't be able to say with certainty that
9 there wouldn't be materials in there --

10 THE COURT: I see.

11 MS. MCCALMONT: -- that would be for --

12 THE COURT: Somebody else.

13 MS. MCCALMONT: But my understanding of how we
14 attempted to collect it is that that should be true that
15 those are limited to the plaintiffs in this case.

16 THE COURT: Okay. And then my last question, and
17 then I'll let you get back to, you know, the presentation
18 that I'm sure you spent time preparing, when -- throughout
19 your papers, there is a -- a recurring statement that after
20 all, Prime is not a party to this case, and, therefore, a
21 more deferential standard applies, and we should be treated
22 better. But what am I to make of the fact that there's at
23 least partly ownership and client relationships between
24 Prime and some of the plaintiffs in this case? Is it really
25 as binary as party, non-party in the sense of sued or not

1 sued in this lawsuit? Or is it -- can I take into account
2 grayer areas where the party receiving the subpoena, while
3 legally incorporated and, you know, the corporate lawyers
4 have done their job and this is a separate legal entity,
5 but, nevertheless, Prime has -- Prime has an interest in the
6 outcome of this litigation. Is that a fair statement?

7 MS. MCCALMONT: I don't believe that is a fair
8 statement, Your Honor. It is true that Prime is owned in
9 part by -- Prime has owners and it has clients. And some of
10 the owner-clients that it has are plaintiffs in this
11 litigation. But Prime also has owner-clients who are not
12 plaintiffs in litigation in this case or others around the
13 country, and it has lots of clients who are not owners at
14 all. And because of those different layers of ownership and
15 clientness, Prime is intended to be and is an independent
16 entity. It operates separately.

17 So it is not the case, for example, that if -- I'm
18 not aware of anyone ever suggesting or any evidence that
19 would show that if the plaintiffs were to recover in this
20 litigation, that Prime has an interest in that outcome.
21 Prime is not a party, is not a plaintiff, has not sued on
22 this and does not stand to benefit financially, which
23 interestingly in some of the cases that CVS cited was the
24 kind of interest that the Court was looking at, is there
25 a financial interest in the outcome, and there really isn't

1 here. So I do think that that's important.

2 To go back to how Your Honor framed the question
3 originally, of course I don't think it's binary, as simple
4 as party, non-party, and I recognize that Prime's connection
5 to the underlying factual circumstances in this case
6 certainly could shade it more in the direction of someone
7 who has an interest. But with all of that said, I think
8 under the case law that CVS has provided, Prime really isn't
9 an interested party and so is entitled to the protections of
10 Rule 45 like any other non-party.

11 THE COURT: Okay. Thanks. That's all the
12 questions I've got at this point. Thanks.

13 MS. MCCALMONT: Thank you.

14 So from Prime's perspective, there are a number of
15 problems with the request to produce these documents in
16 response to Request 2. So one issue is, as framed, the
17 documents are equally available from the plaintiffs.

18 Perhaps, more importantly, these materials are
19 very much the most confidential documents that Prime has.
20 This is Prime putting forward a proposal to a plaintiff or
21 to a health plan saying, This is how we would be able to
22 help you. So it includes information like Prime's pricing
23 methodologies. It includes everything about Prime's
24 business structure, how it's a value add. Everything about
25 how Prime runs its business and operates in the marketplace

1 is included in these documents which run to hundreds of
2 pages. The overwhelming majority of which, even in the ones
3 that include the words "U & C," have nothing to do with the
4 subject matter in this litigation. And so these documents
5 are ones that Prime takes great care to protect and wants to
6 continue to take great care to protect and has very genuine
7 concerns about turning over to anyone, but certainly to CVS
8 that -- which is a company that owns a direct competitor of
9 Prime in CVS Caremark.

10 THE COURT: There is a protective order in this
11 case, though, is there not -- in the Rhode Island case, I
12 mean?

13 MS. MCCALMONT: There is, Your Honor. We have
14 some concerns about whether the protections in the
15 protective order would be sufficient. So, specifically,
16 there are -- when I was looking at it, there are some -- for
17 example, the parties can reveal information that is
18 designated highly confidential, outside counsel's eyes only,
19 to experts. And something that I know has been an issue
20 before could be an issue is if the experts who are retained
21 are ones who are employees or affiliated with Prime's
22 competitors.

23 THE COURT: Okay. I mean, and I -- and I take
24 that as a legitimate concern, but is the answer to that
25 legitimate concern to have me shade the outcome of this

1 motion one way or the other, or is the appropriate remedy to
2 go and see my counterpart in Providence and say, This
3 protective order needs to be tuned up?

4 MS. MCCALMONT: That's fair, Your Honor. I think
5 if Your Honor directed us to produce any part of the
6 documents that are responsive to this RFP, we would take up
7 questions about the protective order with CVS and
8 potentially with the Judge in Rhode Island.

9 THE COURT: Okay.

10 MS. MCCALMONT: But to go back to just the very
11 foundational point, Your Honor, Rule 45 permits the quashing
12 of subpoenas that require the disclosure of confidential
13 information. We think that's appropriate here both because
14 of the sensitivity of the information and because of the
15 overwhelming irrelevance based on our good-faith preliminary
16 review of the materials that these represent.

17 At a minimum, if Your Honor was inclined to order
18 us to produce something, we would ask that it be limited to
19 the 236 documents that hit on the U & C search term. I
20 actually -- it's not clear, but from the response in CVS's
21 motion papers, it seemed to me like they might be agreeing
22 that that would be appropriate. And even so limited, we
23 would ask that we be permitted to redact the portions of
24 those documents that do not contain information that is
25 relevant to the underlying case given its sensitivity and

1 its irrelevance.

2 THE COURT: All right. You also wanted to talk
3 about cost shifting and the motion to compel. Am I right?

4 MS. MCCALMONT: Yes, Your Honor.

5 THE COURT: Okay.

6 MS. MCCALMONT: So on the cost shifting point, so
7 I'll start by noting I was just looking this morning again
8 and Prime has already spent more than \$50,000 responding to
9 CVS's subpoena. We are not seeking to recover those costs
10 or to have those costs shifted, but I do think that's an
11 important background point for the request here, which is
12 that CVS be directed to bear all or some of the costs of
13 compliance for the remainder of the subpoena, which, by our
14 calculation and from estimates received from our vendors,
15 which we put into our briefing, we think will be well in
16 excess of \$100,000 to review what it turns out is something
17 closer to 67,000 documents.

18 THE COURT: Is that over and above the 50,000
19 already spent, or is that an additional 50,000?

20 MS. MCCALMONT: It's 100,000 over and above the
21 50,000 already spent.

22 THE COURT: 150,000 total?

23 MS. MCCALMONT: Yes.

24 THE COURT: Estimate. Understood.

25 MS. MCCALMONT: Yes.

1 THE COURT: Okay. Thank you.

2 MS. MCCALMONT: So, once again, cost shifting is
3 appropriate under Rule 45(d) which requires protection from
4 significant expenses associated with costs of compliance
5 with a subpoena, as well as allows for sanctions related to
6 things like bringing motions like this one, which we are
7 also asking for here.

8 In addition to being appropriate under the rule,
9 we think that cost shifting is appropriate under this
10 Court's precedent, including the *Rochester Drug* case, which
11 I know Your Honor is well familiar with, as well as the *West*
12 *Publishing* case. *Rochester Drug* allocated 80 percent of the
13 costs for some of the compliance, *West Publishing*
14 50 percent.

15 In response to our request for cost shifting, CVS
16 makes a number of points. I'll address them just very
17 briefly in advance. I may have more to say after CVS's
18 counsel speaks of course.

19 THE COURT: I'm sorry. I didn't hear that last --
20 is the microphone close to you?

21 MS. MCCALMONT: I can move it closer, Your Honor.

22 THE COURT: Yeah.

23 MS. MCCALMONT: Is this better?

24 THE COURT: That's much better. Thank you.

25 MS. MCCALMONT: Yes. Sorry.

1 So I said I'll just address very briefly, since we
2 did not have a reply, some of the points that CVS makes in
3 their opposition.

4 So one is CVS says that Prime is a company. It's
5 not an individual. It can bear these costs. Interestingly,
6 some of the cases that CVS cites again talk about not just
7 the costs -- whether the costs can be borne by the recipient
8 of the subpoena, but whether the recipient can bear those
9 costs better than the issuer. And in this case while it
10 might be true that Prime is a company, CVS is an even bigger
11 one; when I looked this morning, Number 4 on the Fortune
12 500. So to the extent there is relative resources
13 associated with being able to bear the subpoena costs, I
14 think it's clear that CVS can bear those costs better than
15 Prime can.

16 Another point is that CVS says a number of times
17 that Prime is already undertaking review of these documents.
18 Prime has gotten subpoenas in other cases. Prime is a
19 third-party defendant, at least for the time being, in a
20 couple of cases.

21 So one response to that is that the documents, the
22 custodians, the search terms in those other cases are not
23 perfect overlaps with the requests that CVS has made here.
24 They are different. There is overlap. I want to be clear
25 about that, but they are not exactly the same.

1 THE COURT: All right. Did you run ratios on
2 those?

3 MS. MCCALMONT: No, Your Honor.

4 THE COURT: Okay. I'm smiling under my mask,
5 but -- I'm just wondering if the methodology you used to
6 gauge irrelevance could also be used to gauge tightness of
7 fit, let's call it, between requests in other litigation and
8 this one, but, okay.

9 MS. MCCALMONT: Sure. So part of the issue with
10 that, Your Honor, would be that the cases are at different
11 stages. So in one case, the *Strauser* case, Prime made a
12 production a number of years ago, so that one is done. But
13 we're -- the negotiations and productions in response to a
14 subpoena in the *Rite Aid* case that CVS cites is -- are still
15 ongoing and the negotiations are very much in their
16 preliminary stages for the *Walgreens* case.

17 THE COURT: Okay.

18 MS. MCCALMONT: Which is one of the ones where
19 Prime is a third-party defendant.

20 And I also just wanted to say that to the extent
21 that CVS believes that Prime will undertake this work
22 anyway, this is a genuine offer. If CVS wanted, we would
23 give them the productions from the *Walgreens* case, from the
24 *Rite Aid* case. They wouldn't have to bear any of the costs
25 associated with our review and production here, and we

1 wouldn't have to incur any additional costs.

2 So, you know, again -- and, in fact, at least with
3 respect to the *Walgreens* case, that's something that CVS
4 asked for. One of their subpoena requests is for the
5 productions that we make in the *Walgreens* case, and they
6 have said that there's substantial overlap between what they
7 have asked for and what Walgreens has asked for. And if
8 that's true, frankly, we think CVS should be willing to wait
9 and get our production in *Walgreens* and call it a day
10 without imposing those additional costs on Prime to review
11 things here.

12 We already touched on as well, so I won't repeat
13 it, a little bit about why we don't think Prime is an
14 interested party here as that phrase is used under the
15 rules.

16 But, again, at base, Your Honor, CVS is asking
17 Prime to spend a lot of money and a lot of time to review
18 documents and to produce them, and simply we think that CVS
19 should be willing to bear some of that cost.

20 I'll turn to the motion to compel unless
21 Your Honor has --

22 THE COURT: No. I have no questions at this time.
23 Thank you.

24 MS. MCCALMONT: Motion to compel will be fast. We
25 think it's moot so --

1 THE COURT: I was going to ask update me, please,
2 on the status of the motion to compel, because it looks like
3 again there was negotiation, meeting and conferring going
4 on, and I did wonder whether some or all of it might be
5 moot.

6 MS. MCCALMONT: Yes, Your Honor. From Prime's
7 perspective, it is moot. The part of the motion -- or the
8 part -- the motion to compel related to Request 16 --

9 THE COURT: Uh-huh.

10 MS. MCCALMONT: -- which has two different
11 components, sort of. The component that was the subject of
12 CVS's briefing related to alleged communications between
13 Prime employees and plaintiff employees about claims data.
14 As we said we would in our motion papers, we tracked the
15 answers to all of that down. It was somewhat complicated
16 because -- it was somewhat complicated, but we tracked it
17 all down. And at the end of the day, we have told CVS that
18 Prime does not have nonprivileged materials to produce in
19 response to that request, and that we will log any materials
20 over which we assert privilege in compliance with the rules
21 so that CVS can assess the privilege and decide whether they
22 want to contest that. But, in any event, there's nothing
23 for us to produce in response to the part of the request
24 that was the subject of CVS's motion.

25 THE COURT: But there might be if CVS gets back

1 and says some of your privilege claims are not well-taken?

2 MS. MCCALMONT: Yes. We believe our privilege
3 claims are extremely well-founded.

4 THE COURT: I'm sure you do.

5 MS. MCCALMONT: Yes, correct.

6 THE COURT: But someone might disagree.

7 MS. MCCALMONT: Yes, Your Honor.

8 THE COURT: Okay. All right. But outside of that
9 scenario, the motion to compel is, from your client's
10 perspective, moot at this point?

11 MS. MCCALMONT: Yes, Your Honor.

12 The other part of the motion to compel, after the
13 briefing here was done, CVS raised a question about a search
14 term that Prime had thought was off the table that would be
15 responsive. To the extent that that's part of what's going
16 on here, we think that's part of what we were moving to
17 quash with the cost shifting. It would be another -- when I
18 said earlier that it's close to 67,000 documents, it's the
19 addition of those additional documents --

20 THE COURT: I see.

21 MS. MCCALMONT: -- in response to an additional
22 search term that I was referring to.

23 THE COURT: Okay. All right. All right. I have
24 no further questions at this time.

25 MS. MCCALMONT: Thank you, Your Honor.

1 THE COURT: Thank you.

2 Mr. Geyerman.

3 MR. GEYERMAN: Yes. Is it okay if I use the
4 podium?

5 THE COURT: It's fine, yes.

6 MR. GEYERMAN: All right.

7 THE COURT: Wherever you are comfortable.

8 MR. GEYERMAN: Okay. Thank you and good
9 afternoon. Thank you for making time for us.

10 CVS is here to ensure that it receives important
11 discovery from an extremely important third-party witness.
12 And we ought to receive that discovery, we believe, under
13 the same terms that any litigant in Federal Court should
14 receive them, which traditionally is you don't have to pay
15 for a third party's costs to go and find documents and
16 produce them.

17 CVS is a defendant in five identical lawsuits all
18 consolidated for discovery; 22 insurance plaintiffs, 12 of
19 them have used Prime as their PBM. Roughly six or seven,
20 depending on the timeframe at which you measure, are owners
21 of Prime.

22 Prime is not your traditional third party. We
23 believe they are very interested in this litigation. One,
24 from a keep-your-owner-happy perspective,
25 keep-your-client-happy perspective, but they are also now a

1 third-party defendant in identical litigation against
2 Walgreens where if there is liability found, where they
3 could potentially be found liable. And so they are
4 certainly factoring that into their overall litigation
5 strategy, it would seem to us.

6 THE COURT: No matter how this case, the Rhode
7 Island case comes out, Prime is neither going to get money
8 nor be made to paid money; is that accurate?

9 MR. GEYERMAN: At this time no one is asserting a
10 claim in the Rhode Island litigation against Prime.

11 THE COURT: So your argument is solely, look at
12 this web of relationships, they have got nonmonetary
13 incentives to participate in this litigation in a particular
14 way.

15 MR. GEYERMAN: Yes. As an example of that,
16 counsel mentioned that with respect to the Request 16, which
17 is the subject of our motion to compel, that they have no
18 nonprivileged documents that relate to communications about
19 this action. The communications that we were told existed,
20 told this by the plaintiff, would have been plaintiff to
21 Prime communications. Those are not communications within a
22 plaintiff or within Prime. By definition, they are a
23 communication that went outside the two entities. So it
24 must be that they are going to assert a joint defense
25 relationship over those documents as the basis of calling

1 them privileged.

2 So I take that as evidence -- I'm sorry.

3 THE COURT: So you've heard from the plaintiff
4 that we've had these communications with Prime, and then
5 Prime says, Everything we've got is privileged. And so you
6 are saying the plaintiff is accurate and Prime is not?

7 MR. GEYERMAN: No. I'm not taking a position on
8 the accuracy or inaccuracy of the privilege assertion. What
9 I'm saying is I'm using the fact that they must be going to
10 be asserting joint defense privilege over those
11 communications as evidence that Prime is not a disinterested
12 third party in this case.

13 THE COURT: No. I understand that point. I guess
14 where I was going, you said these are communications from
15 plaintiffs to Prime. That suggests to me that those
16 communications can be gotten from the plaintiff without the
17 need for a subpoena to Prime, and also that that would
18 further apply to RFP Number 2 because Prime, in that case,
19 is responding to requests for proposals, and those RFPs came
20 from the plaintiffs, so, presumably, Prime responded to the
21 plaintiffs. I mean, if they get an RFP from Joe, they are
22 not going to reply to Stanley.

23 MR. GEYERMAN: It's a fair comment. I will make
24 this observation. I think it's important to separate the
25 two requests. Let's talk about the RFPs first.

1 THE COURT: Okay.

2 MR. GEYERMAN: The RFPs were -- at least Prime had
3 a very easy time finding them. They said, We found these
4 1,200-plus RFPs. We then ran some search terms and the
5 number is down in the 200s. They apparently collected them
6 and saved them in some isolated place.

7 The plaintiffs -- we've definitely asked for these
8 documents from the plaintiff. And we have received some.
9 But we have received a complete patchwork of the RFP
10 responses. Some have more than others. Some only have them
11 from the last couple of years. They don't go back to 2008,
12 which is sort of the beginning of the CVS program at issue.

13 We're the defendant. We got sued in 2020 over
14 conduct that goes back to, you know, before 2010, several
15 years before that. And so we're doing the best that we can,
16 but different companies had different document retention
17 practices. And so we went to Prime and said, If you have
18 these, you should produce them to us. We've asked the
19 plaintiffs for them too, but there's no guarantee what we're
20 going to get out of it. And so we have, frankly -- Prime
21 has a lot more, it has turned out, in terms of preserving
22 these RFP responses than the plaintiffs have themselves.

23 So there's no principle of law that says I'm
24 prohibited from going after the two sources that I know at
25 one time had the document.

1 THE COURT: I agree with you --

2 MR. GEYERMAN: Yeah.

3 THE COURT: -- that there's no principle of law.

4 There is, though, in Rule 45, I would say, a special
5 solicitude for people who receive subpoenas and who are
6 in -- you know, if you are in a lawsuit, you are in a
7 lawsuit. But if you are not in a lawsuit and you are
8 dragged in, then the Rules of Civil Procedure give you
9 special, well, solicitude.

10 MR. GEYERMAN: And I acknowledge that. And let me
11 just clear the air a little bit. We will accept the 200
12 and --

13 THE COURT: I was going to ask.

14 MR. GEYERMAN: -- 36, all right?

15 THE COURT: All right. So I can check that box?

16 MR. GEYERMAN: We don't have time at trial to
17 introduce 1,000 of these; right?

18 THE COURT: Uh-huh.

19 MR. GEYERMAN: But the 200 and change -- the 236
20 that they have identified, we believe we should receive it
21 without redaction. There are many different issues that
22 these RFP responses speak to. I can tick them off. They'll
23 explain what Prime's understanding of usual and customary
24 pricing means. Maybe it says, does it include or exclude a
25 membership program or discount card, the core issue in the

1 case. If Prime does not make a representation in winning
2 the business to the plaintiffs that they will always receive
3 the lowest price that's out and available in the
4 marketplace, that is a very significant fact for us because
5 that's part of our defense in the case is that this price
6 that was made available to people that bought into a special
7 club, that was not a price anybody else was entitled to if
8 they hadn't joined the club.

9 And so in our litigation of these cases for CVS
10 for the last six to seven years, we've never seen a PBM make
11 a representation to a potential client when winning the
12 business that says you will get the lowest price always if
13 you select me as the PBM. And the RFP responses are the
14 evidentiary mechanism to prove that point.

15 THE COURT: I don't think that Prime is taking
16 issue with the topics in the Rhode Island litigation that
17 the 236 documents will be used for. They are taking issue
18 with the fact that some of the experts that you, under the
19 protective order, can share them with are -- I don't know if
20 it was CVS employees, but certainly people who are a little
21 too close for comfort to CVS's C-suite.

22 MR. GEYERMAN: Okay. I heard that argument today.
23 I hadn't heard it before. We amended the protective order
24 in this case a second time at the PBM's behest. The
25 plaintiffs told us the PBMs want you to add an outside

1 counsel's eyes only layer of confidentiality because we were
2 getting into the issue of RFPs. And we added that third
3 layer. So my client can't even see these documents.

4 THE COURT: Right.

5 MR. GEYERMAN: Only Mr. Guiang and myself can see
6 these documents.

7 If there's an issue about experts, I think we can
8 work through it. We, frankly, I think, made a
9 representation in other cases in this same sort of
10 litigation that experts that we're working with aren't
11 actively working with any PBMs or pharmacies in the
12 industry, and I don't see why we couldn't make that again.

13 Obviously we -- until such time as an expert's
14 identity is disclosed, I don't -- I'm not going to commit to
15 disclosing identities of experts, but we have never had a
16 problem working through this issue before despite having to
17 subpoena all the biggest PBMs.

18 THE COURT: So this issue has come up before?

19 MR. GEYERMAN: The issue of there's a concern
20 that, you know, this is highly confidential information to
21 other PBM companies, that has been worked through before.
22 And I can't remember precisely how we handled it in another
23 Rhode Island case, but it's not a reason to deny the
24 discovery. It's a logistical issue that, again, I hadn't
25 heard until today, but I'm confident we can work through it.

1 It certainly isn't a basis to deny discovery. We have the
2 highest level of protection I've ever seen in my practice in
3 three layers of confidentiality in the current protective
4 order.

5 So we would want these 236 RFPs, no redactions.
6 They can use the highest level of confidentiality, fine.
7 And if they have some other concern about experts, I'm
8 willing to discuss that with them, and I'm confident we can
9 work out a solution. That's all I really can say on the
10 236.

11 THE COURT: No. I understand that. I'm trying to
12 form a question, and here -- let me state my concern
13 instead. When I rule on this, I want to rule on it and, you
14 know, you're great people, but I want to say good-bye.

15 MR. GEYERMAN: Yes.

16 THE COURT: I don't want to come back on have we
17 sufficiently accommodated the experts. And I'm trying to
18 think of a mechanism for dealing with that in this, but
19 that's for me to worry about after this hearing.

20 MR. GEYERMAN: My recollection, and, again, I'm
21 doing this off of recollection, I believe that in another
22 case before this same judge in Rhode Island, we -- we told
23 the third parties that our experts were not, like, currently
24 employed with any PBM or pharmacy. And, you know, a lot of
25 them are consultants so this is their bread and butter.

1 They are experts in this. And so they are going to have
2 consulting clients. But nobody is an employee, and,
3 therefore, you know, getting their paycheck from the PBMs.
4 So I don't know if a similar sort of representation to
5 the -- to Prime here will do that. I'm not -- you know, I
6 can't speak to that.

7 THE COURT: I understand. I understand. Okay.

8 MR. GEYERMAN: Okay. So as to the second bucket
9 of documents you're being asked to deal with, this is what
10 in our brief we call the 64,000 documents identified by the
11 search terms.

12 This is not an unreasonable volume of documents to
13 ask a third party, like Prime, to review in this case. They
14 go to the most core issues. The most core issue in the
15 case, what does usual and customary mean, and do membership
16 programs and discount cards fit in that definition or not?
17 This pool of documents satisfies four different requests in
18 five different cases brought by 22 insurance companies. So
19 four times five, you could in some way consider this
20 satisfying 20 requests that could have been served on Prime
21 had each of these insurers filed their own separate lawsuits
22 against CVS.

23 Prime reviewed 28,000 documents in one case
24 against Rite Aid. We're asking them to review 64,000
25 documents in five cases against CVS. And the *Rite Aid* case

1 didn't even involve Blue Cross plans that were suing the
2 captive clients of Prime, suing the defendant, whereas they
3 are here. So I think even by sort of their own historical
4 conduct, we're not out of the realm of reasonableness in
5 asking them to review it.

6 As a point of comparison, I know Your Honor is
7 familiar with Caremark, the PBM from your EpiPen litigation.

8 THE COURT: I am.

9 MR. GEYERMAN: That's my same firm. Caremark is a
10 third party in this litigation. Caremark is the PBM for I
11 believe three of the Blue Cross plaintiffs. Caremark has
12 reviewed over 218,000 documents in response to third-party
13 discovery in this case, and they've produced well over
14 30,000 documents already to date. So as a point of
15 comparison, PBMs are a rich source of documents in these
16 cases.

17 THE COURT: Yes, they are, and they complain
18 mightily when they are subpoenaed, including Caremark. I
19 mean, you know, it's in the papers that you protested the
20 3,620 documents was unduly burdensome, and now 65,000
21 isn't --

22 MR. GEYERMAN: And I'm glad you brought that up.
23 The reason we opposed that, Your Honor, was because in that
24 case we'd already performed two other ESI searches, and so
25 the disputed issue was we thought we were done. We thought

1 we'd made a deal. And they came back a third time and said,
2 Now we want you to run this. And in the opening
3 introduction of the briefing that they attached, we say,
4 enough is enough. At some point we had to draw the line.
5 So the volume that was at issue there, yes, was 3,000
6 documents, but that's because it comes on the third search
7 that had been performed in that case. So it's not at all --
8 it's not all analogous.

9 And, by the way, we had to do it. We had to pay
10 our own costs. We had to do it within 30 days. So, yes,
11 it's not easy to get documents out of these PBMs, but they
12 are absolutely the fulcrum of these transactions, and they
13 are the way to defend themselves -- for the pharmacies to
14 defend themselves.

15 There's significant overlap with the documents
16 asked for in the *Walgreens* case. In preparation for today,
17 we spoke with Walgreens' counsel earlier this week. Our
18 understanding is that 9 out of the 11 custodians that we've
19 asked for here are custodians that are going to be
20 custodians in the *Walgreens* case. So we're talking about
21 the same people.

22 Exhibit ECF Number 23-11, which was our Exhibit K
23 to our motion, was a side-by-side comparison of the two
24 document requests. The *Walgreens* ones are broader, but in
25 substance, we're getting at the same nub of the same

1 documents.

2 THE COURT: And did I hear correctly that just a
3 few minutes ago plaintiff offered to give you the *Walgreens*
4 production?

5 MR. GEYERMAN: Well, that was the first offer I'd
6 heard about it. Here's part of the problem. We can't
7 control the schedule in the *Walgreens* case. We're under a
8 schedule in this case that, as of today, has an end of fact
9 discovery at the end of October. What has become clear to
10 us over the last about 45 days is that whoever -- the
11 counsel representing the Blues in the *Walgreens* case also
12 represents the Blues in *Rite Aid*, and they seem to be
13 driving the schedule. And the counsel who's suing CVS,
14 because that other counsel is conflicted against CVS, is
15 taking their marching orders on the schedule from the other
16 national counsel.

17 And so even though our judge is setting short
18 deadlines on us, we're not getting the documents out of the
19 plaintiffs and out of Prime really on our schedule because
20 the *Walgreens* schedule is getting extended. To the extent
21 that just about two weeks ago the *Walgreens* date got
22 extended to the end of April, an hour before this hearing,
23 we got an e-mail from our plaintiff saying, Hey, can we
24 extend the new discovery schedule to match what the
25 *Walgreens* schedule is? And now we hear counsel for Prime

1 say if they just want to wait until they get the document
2 production from the *Walgreens* case, we can't like -- at this
3 point, we can't wait. We're litigating our own case. We
4 were first so we had to do it.

5 And so I don't know when I'm going to get the
6 *Walgreens*. I'm not a part of those negotiations firsthand,
7 so I think I'm entitled to both of this. I'm entitled to
8 get what I've negotiated for or what I'm trying to get with
9 the 64,000 documents now, and then if there's more stuff
10 that gets produced in the *Walgreens* case down the road, then
11 they can produce that to us. No burden either.

12 But I don't even know when the *Walgreens*
13 production would be done, so it's really hard for me to
14 evaluate that offer about just take the *Walgreens*
15 production. At this point --

16 THE COURT: Right now, though, in Rhode Island,
17 your fact discovery closes with the end of October?

18 MR. GEYERMAN: Yes. Yes. And both sides I think
19 have acknowledged that that is not realistic to hold.
20 However, we've waited because nothing gets stuff done like a
21 deadline. And so we didn't want to move it until we
22 absolutely had to. And tomorrow, September 30th, was
23 supposed to be the Blues plaintiff's deadline to
24 substantially complete their production, at which point, we
25 thought we could make an informed judgment about how long an

1 extension was realistic.

2 THE COURT: So at this point, you have not taken
3 depositions -- moved to the deposition phase?

4 MR. GEYERMAN: We've taken one deposition. It was
5 of a plan that doesn't use Prime because --

6 THE COURT: You are going to take more
7 depositions.

8 MR. GEYERMAN: Oh, there's going to be quite a
9 number of them, yes.

10 THE COURT: You are not going to get them done by
11 the end of October, so that is going to move.

12 MR. GEYERMAN: Correct. Correct.

13 But to respond to the offer of getting the
14 *Walgreens* production, I'm not in a position to make that
15 judgment now. I just don't know enough about when that's
16 going to happen.

17 THE COURT: Let's say that hypothetically you can
18 get the *Walgreens* production tomorrow. Satisfied?

19 MR. GEYERMAN: Yes.

20 THE COURT: Okay. I just wanted to know what part
21 of this was timing and what part of this was substance. And
22 it sounds like it's timing.

23 MR. GEYERMAN: Yeah.

24 THE COURT: Okay. No. That's fair.

25 MR. GEYERMAN: Yeah.

1 THE COURT: That's all I wanted to know.

2 MR. GEYERMAN: On the -- so I just want to make
3 sure we discuss the actual elements of the legal tests for
4 cost shifting --

5 THE COURT: Uh-huh.

6 MR. GEYERMAN: -- since that will be part of the
7 analysis. CVS is a huge company. Prime is a huge company.
8 So -- but the burden is on them to prove that it would be
9 unfair and they don't have the resources to complete the
10 third-party discovery that they need. And they can't make
11 that showing and haven't even really argued that they can
12 meet that showing. So it certainly doesn't prove that CVS
13 should pay for it. It's their burden. We've answered tons
14 of third-party discovery and been a defendant in a lot of
15 these cases, but this is the first time we've ever asked
16 them to produce anything in any of these cases.

17 I just want to point out the *Cornell* case in our
18 brief --

19 THE COURT: Uh-huh.

20 MR. GEYERMAN: -- as evidence that even there
21 where the third-party subpoena recipient was estimated they
22 would incur in excess of \$220,000 to comply with the
23 subpoena, the Court didn't shift costs. It was a big
24 company. I believe it was FedEx. So this is -- you're not
25 like out of bounds or doing something unprecedented in

1 saying no just because we're talking a six-figure compliance
2 number, then costs needed to be shifted.

3 I'll finally address the cross-motion to compel,
4 Request 16.

5 THE COURT: Sure.

6 MR. GEYERMAN: The only -- so I guess we have to
7 wait for the privilege log on the documents they represent
8 to us are privileged. But in counsel's brief opposing our
9 motion to compel, they made the assertion that they ran a
10 search and got no hits.

11 As I read, Your Honor, their ECF Number 4-3, this
12 was their Exhibit C, there was one term -- one search term
13 that they ran for the purpose, as I understood it, of
14 identifying documents related to this case, and that's CVS
15 within three of, and then they list all the plaintiffs, and
16 they limited it to the date that the first lawsuit was filed
17 through the present. And they said they found 2,450
18 documents. And so if they have those, we believe they ought
19 to review those. It's addressing a different request for
20 production. It's not the request for production about what
21 does usual and customary mean and what's your position on
22 membership programs. That's the four requests that relate
23 to those 64,000 document terms. Those are the ones that
24 overlap what the *Walgreens* case requests. But if they have
25 2,400 documents that are about CVS and the plaintiff in the

1 window of time when this case has been pending for the last
2 two years, we believe we should get those.

3 THE COURT: All right. All right. Thank you very
4 much.

5 MR. GEYERMAN: Thank you, Your Honor.

6 THE COURT: All right. Brief response.

7 MS. MCCALMONT: Yes, Your Honor. Very briefly.

8 So --

9 THE COURT: Start with the 2,400 documents. That
10 caught my attention.

11 MS. MCCALMONT: I'm sorry. Say that again.

12 THE COURT: The 2,400 documents, I must say,
13 caught my attention.

14 MS. MCCALMONT: Sure. So the issue there,
15 Your Honor, is that there was a miscommunication between us
16 and CVS's counsel, I guess, in the sense that we believed
17 that we were negotiating the search terms that they wanted
18 us to run against custodians for their entire set of
19 subpoena requests that were not just sufficient to show
20 documents. So we have already made an effort to collect and
21 produce I think it's over 500 pages of documents in response
22 to a number of their requests that were separate from the
23 ones they wanted us to apply search terms to.

24 The e-mails back and forth on this point are all
25 exhibits to the briefing. We reached a point where we said,

1 Are these the final search terms and custodians, throughout
2 we had reserved our right about the fact that this was
3 burdensome, and they said yes. And this search term that
4 they have now identified was not on that list. It was a
5 search term the parties had discussed earlier in the process
6 but not one that had been part of this this is our final set
7 of search terms. So, again, I don't think there's any ill
8 will here, but our understanding was that the search terms
9 they had provided were all of the search terms that they
10 wanted us to run. And after this briefing was complete,
11 they came back and readded this one that generated the 2400
12 documents.

13 If we had understood that to be part of the search
14 terms they were requesting, I think it actually is fairly
15 part of our motion to quash because our intent was to cost
16 shift for all of the search term review process. And so I
17 don't believe that that 2,400 documents is separate. We
18 just didn't understand them to be pursuing that request
19 until very recently. Is that sufficiently responsive on
20 that point?

21 THE COURT: That's a sufficient response. Yes.

22 MS. MCCALMONT: So, again, we think that's part of
23 the motion to quash then, and, therefore, the motion to
24 compel is still moot and can be denied on that basis.

25 To go back to RFP 2 just very briefly, I just

1 wanted to have clarity on one point, which is that with
2 respect to the 236 documents, to the extent that Prime is
3 going to be asked to review those, it is -- as we sit here
4 today, we're not agreeing that those 236 documents are all
5 responsive and relevant and should be produced. We think
6 that's the set that should be reviewed.

7 So our experience in this shades into the
8 experience with the 64,000 as well, is that there's an issue
9 caused by the fact of how the U & C search term is used. So
10 usual and customary pricing or the U & C price is part of
11 every single transaction that Prime adjudicates. It is a
12 term that is all over everything. Almost nothing of that
13 has to do with the issues in the CVS litigation or in the
14 other litigation which is about the impact of pharmacies'
15 discount programs on the U & C price.

16 So our experience is that what looks like a high
17 volume of responsive relevant materials becomes a very small
18 number of actually relevant materials once they are
19 reviewed, so I just wanted to clear that up because we do
20 think that we should still have the opportunity, we have not
21 yet, to review those 236 documents to determine whether they
22 are relevant on the theories that counsel has articulated
23 and to only produce relevant materials with irrelevant
24 information redacted.

25 One other just very small point of clarity. I

1 think that counsel said that the protective order was
2 amended at the PBM's request. I don't know which PBMs, but
3 Prime has not been part of discussions about the CVS
4 protective order, so we would want to have the opportunity
5 to talk about the issues we raised today.

6 THE COURT: All right. And then a question. When
7 will the *Walgreens* production be ready?

8 MS. MCCALMONT: So -- so I don't yet know,
9 Your Honor. We are -- I think we have reached agreement on
10 custodians, and we've made good progress on search terms.
11 The *Walgreens* case just was subject to a six-month
12 extension, so it will be at some point in the next six
13 months. I think it will be significantly sooner than that,
14 but we don't yet have the final volume that Walgreens -- we
15 haven't reached agreement on what we're going to be
16 reviewing and haven't collected all those documents yet.

17 With all of that said, what I just -- I wanted to
18 underscore a couple of points about what CVS' counsel said
19 here. One was the plaintiffs just asked for an extension
20 that would put their case on the same track as the Walgreens
21 case, which I think underscores, again, why it would be
22 appropriate to allow Prime to do that production and for
23 counsel to accept it, as they said they would, as opposed to
24 imposing an entirely separate set of the costs related to
25 compliance with the CVS subpoena now.

1 On that -- on the point of timing that counsel
2 raised, counsel indicated that they spoke to counsel for
3 Walgreens in preparation for today. I also think that -- I
4 don't think that CVS's counsel would fault us for how we
5 have communicated in this case. We have been completely
6 transparent about what we're doing. We have been completely
7 responsive every time they've asked a question. So to the
8 extent that there are concerns that we would use this as
9 some opportunity to slow roll them, that is absolutely not
10 the case. We are genuine in wanting to limit the burden on
11 Prime for compliance with the subpoena. And so to the
12 extent that Prime is going to be undertaking a separate
13 process that is sufficient for CVS's purposes, we think it's
14 appropriate to allow us to do that and to not have to do two
15 separate reviews and productions.

16 THE COURT: Well, if the *Walgreens* production is
17 going to be some, you know, five, six months out, the offer
18 could be that Walgreens gets what you produce to CVS.
19 Right?

20 MS. MCCALMONT: I don't think that it's likely to
21 work that way, Your Honor, just based on preliminary
22 conversations with Walgreens, because I think Walgreens
23 wants more than what CVS wants from their preliminary
24 discussions, so I don't think they would accept what CVS
25 wants. Like I said, there's overlap, but it's imperfect,

1 but Prime is currently a third-party defendant in that case
2 so their position is different and Walgreens is pressing for
3 a lot more, so I --

4 THE COURT: So the offer to have the *Walgreens*
5 production turned over in this case is based on similarity
6 of requests and not on actual review of documents and --
7 that has been undertaken, because it sounds like Walgreens
8 is a long way from being finished?

9 MS. MCCALMONT: So it is -- right. It is based on
10 similarity of requests and discussions related to custodians
11 and search terms where we think there is overlap but, again,
12 not perfect overlap. I think -- I guess I wouldn't agree
13 that Walgreens is a long way from being finished,
14 Your Honor. We're making good progress. We had a
15 conference with the Magistrate Judge in the Northern
16 District of Illinois a couple weeks ago, and she is
17 absolutely going to hold us to a schedule. Again, as I sit
18 here today, I can't commit to a timeframe because we don't
19 have the volume of documents negotiated yet, but I think it
20 is not going to be five or six months before those documents
21 are produced.

22 THE COURT: All right. Anything further for
23 today?

24 MR. GEYERMAN: Nothing, Your Honor. I would just
25 say our volume of documents we're asking for is

1 substantially narrower than the *Walgreens*. I think that
2 proves we're being reasonable and targeted in our request.

3 THE COURT: Anything further for today?

4 MS. MCCALMONT: No, Your Honor. Thank you.

5 THE COURT: All right. This is going to have to
6 be the subject of a written order. I am fond of ruling from
7 the bench, but I also want to make sure that I cover
8 everything, and so you're, I'm afraid, going to have to
9 wait. I am aware that at least technically as of now we're
10 looking at an October 1st deadline in Rhode Island, but I'm
11 going to handle the case that's in front of me and not the
12 case that's in Rhode Island. So I'm afraid you will have to
13 wait. All right.

14 Thank you all. I appreciate it. It was a
15 pleasure, and Court is adjourned.

16 (Court adjourned at 2:50 p.m.)

17 * * *

18
19
20 I, Erin D. Drost, certify that the foregoing is a
21 correct transcript from the record of proceedings in the
22 above-entitled matter to the best of my ability.

23
24 Certified by: s/ Erin D. Drost

25 Erin D. Drost, RMR-CRR